

**Timothy J. Hogan**

**From:** Timothy J. Hogan  
**Sent:** Tuesday, July 19, 2005 11:33 AM  
**To:** 'Damian Capozzola'; Clyde Matsui (cmatsui@triallawhawaii.com); K Akamine  
**Cc:** ael@ksglaw.com; cmatsui@triallawhawaii.com; Eric Liebeler; Emily Reber Porter (E-mail); Rex Fujichaku; gtom@wik.com; John T. Komeiji; K Akamine; kgabler; Sheldon Toll (E-mail); Lex Smith; Lyle Hosoda; Margery Bronster (E-mail); Olivia Samad; Rex Y. Fujichaku; rpbm@Hosodalaw.Com; Roy Tjoe (E-mail); Victor Limongelli (E-mail); Wesley H. Ching (E-mail)  
**Subject:** RE: Letter to Discovery Master

**Tracking:** Recipient Read

'Damian Capozzola'  
Clyde Matsui (cmatsui@triallawhawaii.com)  
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cmatsui@triallawhawaii.com  
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Roy Tjoe (E-mail)  
Victor Limongelli (E-mail)  
Wesley H. Ching (E-mail)  
'Wayne Berry'  
Wesley W. Ichida

Read: 7/20/2005 9:37 AM

Dear Mr. Capozzola:

So we don't get delayed in another claim of inadvertent disclosure of privileged materials please see: United States Fid. & Guaranty Co. v. Braspetro Oil Servs. Co., 2002 U.S. Dist. LEXIS 111, 53 Fed. R. Serv. 3d (Callaghan) 60 (S.D.N.Y. Jan. 4, 2002). This case involved a similar discovery dispute in which Defendant alleged that attorney-client privilege applied to 60 electronic discs that had been supplied to defendant's experts. Plaintiffs asserted that supplying the discs to the experts had ceased any level of confidentiality and the court agreed and ordered the defendant to produce all information that had been provided to their experts. In this case, the waiver was clear because the expert "could" open the files. It didn't matter "if" the expert actually opened them.

**EXHIBIT "D"**

In addition, you have claimed privilege over the database and Crystal reports files as part of the privileged files. You refuse to produce a log and are using this claim of privilege to stymie Mr. Berry from being able to present his case and to ferret out the fraud.

Your intentional waiver is complete and irrevocable. Because you have waived a substantive right of the Debtors and the committee, do you think this issue should be run past Judge Walrath for her say on the waiver? See also CP Kelco United States, Inc. v. Pharmacia Corp., 213 F.R.D. 176, 178 (D. Del., 2003) (Delaware District Court finding all materials provided to trial expert must be produced because privilege is irrevocably waived).

Tim Hogan

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**From:** Damian Capozzola [mailto:[dcapozzola@kirkland.com](mailto:dcapozzola@kirkland.com)]

**Sent:** Tuesday, July 19, 2005 10:50 AM

**To:** Timothy J. Hogan

**Cc:** ael@ksglaw.com; cmatsui@triallawhawaii.com; Eric Liebeler; Emily Reber Porter (E-mail); Rex Fujichaku; gtom@wik.com; John T. Komeiji; K Akamine; kgabler; Sheldon Toll (E-mail); Lex Smith; Lyle Hosoda; Lyle Hosoda; Margery Bronster (E-mail); Olivia Samad; Rex Y. Fujichaku; rpbm@Hosodalaw.Com; Roy Tjoe (E-mail); Victor Limongelli (E-mail); Wesley H. Ching (E-mail)

**Subject:** RE: Letter to Discovery Master



Mr. Hogan,

I believe you are mistaken. We specifically instructed Dr. Walker to disregard any attorney-client materials and focus exclusively on the technical issues relevant to his analysis, and if and when you depose Dr. Walker you will be free to explore this issue. But under the present circumstances we do not believe there has been a waiver of any sort; I invite you to make whatever motion you feel you need to make if you continue to disagree.

Thank you for your attention to these matters.

-Damian

**Damian D. Capozzola | KIRKLAND & ELLIS LLP**  
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"Timothy J. Hogan" <tjh@loio.com>

07/19/2005 01:41 PM

To "Damian Capozzola" <dcapozzola@kirkland.com>, <cmatsui@triallawhawaii.com>, "K Akamine" <kakamine@triallawhawaii.com>, <cael@ksglaw.com>, "Eric Liebeler" <eliebeler@kirkland.com>, "Emily Reber" <reber@kirkland.com>, "Rex Fujichaku" <fujichaku@hotmail.com>, <gtom@wik.com>, "John T. Komeiji" <JKomeiji@wik.com>, "kgabler" <kgabler@nchc.com>, "Sheldon Toll" <Sheldon.Toll@comcast.net>, "Lex Smith" <lex@gti.net>, "Lyle Hosoda" <lsh@hosodalaw.com>, "Lyle Hosoda" <lshosoda@hotmail.com>, "Margery Bronster" <mbronster@bchlaw.net>, "Olivia Samad" <OSamad@kirkland.com>, "Rex Y. Fujichaku" <fujichaku@bchlaw.net>, <rpbm@Hosodalaw.Com>, "Roy Tjoe" <Roy.Tjoe@goodwill.com>, "Victor Limongelli" <victor.limongelli@guidancesoftware.com>, "Wesley H. Ching" <WHC@fmhc-law.com>

cc Subject RE: Letter to Discovery Master

Dear Mr. Capozzola:

We have no objection to the materials being provided to Mr. Walker under the terms of the protective order.

→ We need to make clear, because the PCT knowingly and voluntarily "shipped" them to its trial expert it can't withhold them from Mr. Berry on the grounds of privilege. It is clear that the PCT has voluntarily waived attorney-client privilege over these materials and their subject matter. I respectfully ask that Master please return our After DVD and request a date certain when we can receive a full copy of the Hard Drive and other materials identified in Mr. Limongelli's letter and shipped to Dr. Walker. We will purchase our drive and await your instructions.

Thank you for your prompt attention to this so we can move forward without delay,

Tim Hogan

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**From:** Damian Capozzola [mailto:[dcapozzola@kirkland.com](mailto:dcapozzola@kirkland.com)]  
**Sent:** Tuesday, July 19, 2005 9:53 AM  
**To:** Timothy J. Hogan  
**Cc:** ael@ksglaw.com; Eric Liebeler; Emily Reber Porter (E-mail); Rex Fujichaku; gtom@wik.com; John T. Komeiji; kgabler; Sheldon Toll (E-mail); Lex Smith; Lyle Hosoda; Lyle Hosoda; Margery Bronster (E-mail); Olivia Samad; Rex Y. Fujichaku; rpbm@Hosodalaw.Com; Roy Tjioe (E-mail); Victor Limongelli (E-mail); Wesley H. Ching (E-mail)  
**Subject:** RE: Letter to Discovery Master

The letter and the materials it describes.

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"Timothy J.  
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07/19/2005 12:45  
PM

To "Damian Capozzola" <[dcapozzola@kirkland.com](mailto:dcapozzola@kirkland.com)>, <[ael@ksglaw.com](mailto:ael@ksglaw.com)>, "Eric Liebeler" <[eliebeler@kirkland.com](mailto:eliebeler@kirkland.com)>, "Emily Reber Porter (E-mail)" <[reporter@goodsill.com](mailto:reporter@goodsill.com)>, "Rex Fujichaku" <[fujichaku@hotmail.com](mailto:fujichaku@hotmail.com)>, "John T. Komeiji" <[JKomeiji@wik.com](mailto:JKomeiji@wik.com)>, "Sheldon Toll (E-mail)" <[lawtoll@comcast.net](mailto:lawtoll@comcast.net)>, "Lex Smith" <[lex@gte.net](mailto:lex@gte.net)>, "Lyle Hosoda" <[ish@hosodalaw.com](mailto:ish@hosodalaw.com)>, "Margery Bronster (E-mail)" <[mbronster@bchlaw.net](mailto:mbronster@bchlaw.net)>, "Olivia Samad" <[OSamad@kirkland.com](mailto:OSamad@kirkland.com)>, "Rex Y. Fujichaku" <[fujichaku@bchlaw.net](mailto:fujichaku@bchlaw.net)>, <[rpbm@Hosodalaw.Com](mailto:rpbm@Hosodalaw.Com)>, <[gtom@wik.com](mailto:gtom@wik.com)>

cc

Subject RE: Letter to Discovery Master

Mr. Capozzola:

Can you please describe the "materials" to which you refer? Is it just the pdf letter or is it more?

Thanks,

Tim Hogan

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 Lynch Ichida Thompson Kim & Hirota  
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**From:** Damian Capozzola [mailto:[dcapozzola@kirkland.com](mailto:dcapozzola@kirkland.com)]

**Sent:** Tuesday, July 19, 2005 9:42 AM

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**Subject:** Fw: Letter to Discovery Master

Counsel,

FYI, we have shipped these materials to Marty Walker. I presume there is and can be no objection, but out of an abundance of caution please let me know if anyone disagrees. Thank you for your attention to these matters.

--Damian Capozzola

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— Forwarded by Damian Capozzola/Los Angeles/Kirkland-Ellis on 07/19/2005 12:40 PM —

"Limongelli, Victor"  
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07/18/2005 12:17 PM

To: <[cmatsui@triallawhawaii.com](mailto:cmatsui@triallawhawaii.com)>, "Timothy J. Hogan" <[tjh@loio.com](mailto:tjh@loio.com)>, "Damian Capozzola (E-mail)" <[dcapozzola@kirkland.com](mailto:dcapozzola@kirkland.com)>, "Emily Reber Porter (E-mail)" <[reporter@goodsill.com](mailto:reporter@goodsill.com)>, "Eric Liebeler (E-mail)" <[eliebeler@kirkland.com](mailto:eliebeler@kirkland.com)>, "John T. Komeiji" <[JKomeiji@wik.com](mailto:JKomeiji@wik.com)>, <[kgabler@nchc.com](mailto:kgabler@nchc.com)>, "Leroy Colombe (E-mail)" <[colombe@ckdbw.com](mailto:colombe@ckdbw.com)>, "Lex Smith (E-mail)" <[lex@gte.net](mailto:lex@gte.net)>, "Lyle Hosoda (E-mail)" <[ish@hosodalaw.com](mailto:ish@hosodalaw.com)>, "Lyle Hosoda (E-mail)" <[ishosoda@hotmail.com](mailto:ishosoda@hotmail.com)>, "Margery Bronster (E-mail)" <[mbronster@bclaw.net](mailto:mbronster@bclaw.net)>, "Rex Fujichaku" <[fujichaku@hotmail.com](mailto:fujichaku@hotmail.com)>, "Rex Y. Fujichaku" <[rfujichaku@bclaw.net](mailto:rfujichaku@bclaw.net)>, "Roy Tjoe (E-mail)" <[rtjoe@goodsill.com](mailto:rtjoe@goodsill.com)>, "Sheldon Toll (E-mail)" <[lawtoll@comcast.net](mailto:lawtoll@comcast.net)>, "Wesley H. Ching (E-mail)" <[WHC@fmhc-law.com](mailto:WHC@fmhc-law.com)>, "K Akamine" <[kakamine@triallawhawaii.com](mailto:kakamine@triallawhawaii.com)>

cc

Subject: Letter to Discovery Master

All – Please find the attached letter to the Discovery Master dated July 18, 2005.

Victor Limongelli | General Counsel | Guidance Software, Inc.  
215 N. Marengo Ave. | Pasadena | CA | 91101 | t 626.229.9191 | f 626.229.9199  
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